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No. 89-1531

In The

Supreme Court of the United States

October Term 1989

EARLE A. PARTINGTON,

Petitioner,

v.

JOSEPH M. GEDAN and HOWARD T. CHANG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the failure by Petitioner in No. 89-1531 actually to "file" his petition for rehearing in the Court below on or before the fourteenth day after judgment in the Court of Appeals, as is required by Fed. R. App. P. 25(a) and 40, renders his petition for review here jurisdictionally untimely in that the petition for rehearing timely filed by Petitioners in No. 89-1506 (Respondents here) on the fourteenth day after judgment below was addressed to the collateral issue of attorneys fees?

2. Whether, assuming Petitioner has timely invoked this Court's authority, Petitioner's claims arising out of attorney disciplinary proceedings commenced against him pursuant to Rule 13 of the Supreme Court of Hawaii were correctly held to be subject to dismissal under the precepts of comity, federalism, and restraint reflected in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, *e.g., Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), or whether certiorari should be denied, or the judgment affirmed, on the basis of the more fundamental reason that such claims are not ripe for federal review?

3. Whether the claims presented in No. 89-1531 are barred by the independent and adequate state ground doctrine?

4. Whether, assuming, *arguendo*, the dispositions in the state courts of which Petitioner here complaints are "final," Petitioner's exclusive avenue of federal review is by way of petition under 28 U.S.C. § 1257, and not by a

QUESTIONS PRESENTED – Continued

"horizontal appeal" to the inferior federal courts of the United States, or, if not, whether the principles of the Full, Faith, and Credit Act, 28 U.S.C. § 1738 (1982), prohibit departure in this case from the law of the case, if any, developed in the state courts?

5. Whether any substantial federal question is presented by Petitioner's claim that the highest court of a state is unconstitutionally biased for purposes of attorney disciplinary proceedings on the basis of rulings in favor of Petitioner's past client in a criminal case where Petitioner was not a party?

6. Whether any substantial federal question is presented by Petitioner's claim that the Due Process Clause, *per se*, bars a State from granting an incentive for criminal defense counsel to reveal client confidences so as to defend themselves against allegations of impropriety, and whether, if so, Petitioner's former client's free and open waivers of the attorney client privilege moot federal protection of the confidences at issue?

7. Whether any substantial federal question is presented by Petitioner's prayer for relief from statements in a judicial opinion that, assertedly, defame one of the lawyers in the case?

8. Whether for any other reason review should be denied?

PARTIES IN THIS COURT

Petitioner in this Court Earle A. Partington, Esq., is a Honolulu attorney. He is plaintiff and appellant in the courts below, and a Respondent in No. 89-1506 (U.S. pet. for cert. filed Mar. 22, 1990), along with the Hawaii Association of Criminal Defense Lawyers, an amicus curiae without standing to appeal the judgment below. Pet. for Cert. at ii, No. 89-1506.

Respondents on this Petition, No. 89-1531, include Joseph M. Gedan, the Rule 13 Special Master in proceedings docketed in the Supreme Court of Hawaii variously as *In re: Earle A. Partington* (Haw. Spec. Master filed 1986), or *State v. Clarke*, No. 10041 (Haw. Spec. Master filed 1986). Special Master Gedan is a defendant in the district court and an appellee in the appeal below, which sought solely equitable relief. Because the relief ultimately sought against Respondent Gedan was equitable in nature, Respondent Gedan submits he has been named as a Respondent in this Court in his official capacity, although he appears in whatever capacity he is in fact so named. Pet. for Cert. at ii, No. 89-1506 (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985))). The Petition in No. 89-1531 also names Howard T. Chang, prosecutor in the Rule 13 proceedings, and a defendant-appellee below, as a Respondent. Respondent Chang appears here as does Special Master Gedan. On February 23, 1990, Rule 13 Prosecutor Chang was succeeded by Mark J. Bennett, who ought to be substituted automatically under this Court's Rule 35.3.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES IN THIS COURT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 6

A. Background of the Litigation: Supreme Court of Hawaii Rule 13 and the Protections Available to Respondent Counsel 7

B. The Rule 13 Proceedings Here and Proceedings in the United States District Court 10

C. Proceedings in the United States Court of Appeals 14

D. Further Proceedings in the State Courts 16

REASONS FOR DENYING THE WRIT

A. The Dismissal of Petitioner's Claims Under the Younger Doctrine Was and Remains Consistent with the Sixth Amendment 19

B. Partington's Assertions of "Institutional Bias" are Wholly Insufficient to Overcome Dismissal. 25

TABLE OF CONTENTS – Continued

Page

C. Partington's Challenges to the Asserted Immediate Impact of the Clarke Ruling Would Overrule Younger Itself and Do Not Merit Review 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Aetna Life & Casualty, Inc. v. Lavoie, 475 U.S. 813 (1986) 18, 25

Anders v. California, 386 U.S. 738 (1967) 21

Ariyoshi v. Robinson, 477 U.S. 215 (1986) 29

ASARCO v. Kadish, 109 S. Ct. 2037 (1989) 21

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 10, 19

Brandon v. Holt, 469 U.S. 464 (1985) iii

Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988) 3

Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989) 21

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 29

Christianson v. Colt Industries Operating Corp., 108 S. Ct. 2166 (1988) 30

Debartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568 (1988) 7

Department of Labor v. Triplett, No. 88-1671 (U.S. Mar. 27, 1990) 20

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 30

Douglas v. California, 372 U.S. 353 (1963) 21

Engle v. Isaac, 456 U.S. 107 (1982) 12

Evitts v. Lucey, 469 U.S. 387 (1984) 21

TABLE OF AUTHORITIES – Continued

Page

Faretta v. California, 422 U.S. 806 (1975) 21

FDIC v. Mallen, 486 U.S. 230 (1986) 29

Felmeister v. Office of Attorney Ethics, 856 F.2d 529 (3d Cir. 1988) 29

Frisby v. Schultz, 108 S. Ct. 2495 (1988) 22, 26

Glass v. Pfeffer, 849 F.2d 1261 (10th Cir. 1988) 25

Graham v. Teledyne-Continental Motors, 805 F.2d 1386 (9th Cir. 1986) 24

HOH Corp. v. Licensing Board, 736 P.2d 1271 (Haw. 1987) 10

Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1984) (per curiam) 25

Kentucky v. Graham, 473 U.S. 159 (1985) iii

Kugler v. Helfant, 421 U.S. 117 (1976) 22, 27

Maier v. Orr, 758 F.2d 1578 (Fed. Cir. 1985) 25

Martin v. Wilks, 109 S. Ct. 2180 (1989) 9

Matsuo v. State, 70 Haw. 573, 778 P.2d 332 (1989) ... 16, 26

McKaskle v. Wiggins, 465 U.S. 168 (1984) 21

McLaughlin v. Union Oil of California, 869 F.2d 1039 (7th Cir. 1989) 25

Michigan v. Harvey, 110 S. Ct. 1176 (1977) 23

Michigan v. Jackson, 475 U.S. 625 (1986) 23

TABLE OF AUTHORITIES – Continued

Page

Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982) ..... i, 6, 14

Missouri v. Jenkins, No. 88-1150 (U.S. Apr. 18, 1990) ... 3, 4

Murray v. The Charming Betsy, 2 Cranch 64 (1804) 7

Nix v. Whiteside, 475 U.S. 157 (1986) 10

Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986) 6, 29

Partington v. Gedan, No. 87-0172 (D. Haw. dismissed July 1, 1987), *aff'd*, 880 F.2d 116 (9th Cir. 1989), *pets. for cert. filed*, Nos. 89-1506 and 89-1531 (U.S. filed Mar. 22, 1990) ..... *passim*

Paul v. Davis, 424 U.S. 693 (1976) 19, 29

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) ..... i, 2, 6, 7, 15, 18, 28

Robinson v. Ariyoshi, 887 F.2d 215 (9th Cir. 1989) 29

Santos v. State, 64 Haw. 648, 646 P.2d 962 (1982) (per curiam) 9

Smith v. Murray, 477 U.S. 527 (1986) 26

State v. Clarke, No. 10041 (Haw. Dec. 27, 1984) .. *passim*

State v. Smith, 68 Haw. 304, 712 P.2d 496 (1986) 10

Strickland v. Washington, 466 U.S. 668 (1984) 8, 20

United States v. Hohri, 482 U.S. 64 (1987) 26

Weatherford v. Bursey, 429 U.S. 545 (1977) 23

Wheat v. United States, 486 U.S. 153 (1988) 8, 21

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 29

TABLE OF AUTHORITIES – Continued

Page

Withrow v. Larkin, 421 U.S. 43 (1976) 14, 21, 26

Younger v. Harris, 401 U.S. 37 (1971) ..... *passim*

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. III 4

U.S. Const. sixth amendment 4, 18-25

U.S. Const. fourteenth amendment 4

Haw. Const. art. I, § 14 (1978) 5

STATUTES:

28 U.S.C. § 1254(1) (West 1989) 4

28 U.S.C. § 1257 (1982) ..... i, 5, 21

28 U.S.C. § 1738 (1982) ..... ii, 5, 30

28 U.S.C. § 2101 (1982) 3, 4

28 U.S.C. § 2111 (1982) 5

Haw. Rev. Stat. § 602-5(6) (1985) 8

Haw. Rev. Stat. § 602-5(7) (1985) 8

RULES OF COURT:

Fed. R. App. P. 25(a) ..... i, 3

Fed. R. App. P. 28 29

Fed. R. App. P. 38 15

Fed. R. App. P. 40 ..... i, 3

Fed. R. Civ. P. 11 15

TABLE OF AUTHORITIES – Continued

Page

Haw. S. Ct. R. 13 ..... *passim*

Haw. DR 4-101(c), *codified at* Haw. S. Ct. R. 2.2(a) (1984) 9

Haw. R. Penal P. 40 (1989) 26

OTHER AUTHORITY:

R. Stearns, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 6.3 (6th ed. 1986) 3

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EARLE A. PARTINGTON,

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JOSEPH M. GEDAN and HOWARD T. CHANG,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Joseph M. Gedan, Special Master appointed by the Supreme Court of Hawaii in *State v. Clarke*, No. 10041 (Haw. Feb. 3, 1986), *et al.*, officers of the State of Hawaii ("State officials"), and Petitioners in No. 89-1506 (U.S. pet. for cert. filed Mar. 22, 1990), pray that the petition for writ of certiorari in No. 89-1531 be denied, or that on any review given, that the judgment below favorable to the State officials be affirmed.

OPINIONS BELOW

The amended opinion of the Court of Appeals is reported at 880 F.2d 116 (9th Cir. 1989), and is reprinted in the appendix to Petitioner Earle A. Partington's Petition for Certiorari, No. 89-1531 ["Pet. App. (No. 89-1531)"] as Appendix ["App."] "A" and in the Appendix to the State officials' Petition for Certiorari, No. 89-1506 ["Pet. App. (No. 89-1506)"] also as Appendix ["App."] "A." The order of the United States District Court for the District of Hawaii, granting, *inter alia*, the State Officials' motion to dismiss, is reprinted at Pet. App. "C" (No. 89-1506). The unreported Memorandum Opinion of the Supreme Court of Hawaii in *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985), is reprinted in Pet. App. "D" (No. 89-1506). Other orders of the Supreme Court of Hawaii or the Hawaii Rule 13 Special Master, dated December 6, 1984, and January 26, February 1, February 12, and February 27, 1990, are reprinted in the appendix to this opposition ["Resp. App. (No. 89-1531)"] as App. "C," "E," "F," "H" and "I," to assist the Court in evaluating No. 89-1531. See this Court's Rule 15.1.[1]

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[1] The Order of the Supreme Court of Hawaii dated December 6, 1984, appears in the record below as part of Exhibit "B" to the Complaint, No. 87-0172 (D. Haw. filed Mar. 9, 1987) (Clerk's Record ["C.R."] 1). The remaining orders, which were issued after the denial of rehearing by the court below on December 22, 1989, *see* Pet. App. "B," No. 89-1531, are for that reason not in the record in this action, but are properly tendered to this Court if, contrary to Respondents' arguments, *infra* (citing *e.g.*, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 17 (1987)), post-filing events are relevant to this Court's review here.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit affirming the District Court's dismissal, pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, was entered March 13, 1989. A timely petition for rehearing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit in San Francisco, on March 27, 1989, by the State officials, seeking reversal only of attorneys fees award against them in the court below. *See* Pet. App. 216-32 (No. 89-1506). A petition for rehearing, and suggestion of the appropriateness of rehearing *en banc*, dated March 27, 1989, was untimely filed in the court of appeals on March 29, 1989, sixteen days after judgment. *See* Fed. R. App. P. 25(a); 40. Both petitions and the suggestion for *en banc* review were denied by the court of appeals on December 22, 1989. *See* Pet. App. "B," No. 89-1531.

Despite the untimeliness of Partington's petition for rehearing in the lower court, the timeliness of the State officials' petition for rehearing may well render the petition for certiorari in No. 89-1531 timely under 28 U.S.C. § 2101 and this Court's Rule 13.4. *See Missouri v. Jenkins*, No. 88-1150, 58 U.S.L.W. 4480, 4484 (U.S. Apr. 18, 1990); R. Stearns, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 6.3 at 313 (construing former Rule 20.4 of this Court). However, the issue is not free from doubt. Strictly speaking, the State officials' Petition for Rehearing below did not seek to alter the "judgment" of the court of appeals in Petitioner's appeal, but rather was addressed to an issue " '[c]ollateral to' " and " 'separate from' the decision on the merits." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988) (citations omitted). As this

Court recently reaffirmed, the practice of suspending the finality of a lower court judgment "does not extend to petitions for rehearing seeking only to correct a formal defect in the judgment or opinion of the lower court." *Jenkins*, 58 U.S.L.W. at 4483 n.13. This rule would appear to apply a fortiori here, as the State officials did not seek any correction of the judgment of affirmance entered below (and, indeed, were entirely satisfied with that judgment). If the Court concludes that the State officials' petition for rehearing below does toll the time both for the State officials and for Petitioner here, however, the Petition here, like that in No. 89-1506, having been filed within 90 days of the denial of rehearing below, is timely under 28 U.S.C. §§ 1254(1) and 2101(c). As will be briefed below, despite its arguable timeliness, the Petition in No. 89-1531 also contains substantial defects under Article III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, clause 1 of the United States Constitution provides in relevant part that

> The Judicial Power [of the United States] shall extend to . . . Cases . . . [and] to Controversies. . . .

The Sixth Amendment to the United States Constitution provides in relevant part that

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Section 1257 of Title 28 of the United States Code provides in relevant part that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. . . .

Section 1738 of Title 28 of the United States Code provides in relevant part that

> The records and judicial proceedings of any court of any . . . State [of the United States] . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken.

Section 2111 of Title 28, United States Code, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Article I, section 14, of the Hawaii Constitution of 1978 provides in relevant part that

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for the accused's defense.

Hawaii Supreme Court Rule 13 is reprinted in Pet. App. "D" (No. 89-1531) and in Pet. App. "E" (No. 89-1506).

STATEMENT OF THE CASE

As stated in our petition in No. 89-1506, this case arises out of the application by the courts below of the rule laid down almost two decades ago in *Younger v. Harris*, 401 U.S. 37 (1971). Reflecting this Nation's commitment to maintaining "the comity between the States and the National Government" and avoidance of "unwarranted determination of federal constitutional questions," *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987), the *Younger* doctrine takes as its starting point the premise that "[c]ertain types of injury, in particular, the cost, anxiety and inconvenience of having to defend against a single criminal [or important civil] prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term." 401 U.S. at 46. Since its announcement, *Younger* dismissal has been held applicable in numerous cases. While not all such expansions have been met with total approval, *Younger*'s extension to suits seeking to restrain state attorney disciplinary proceedings "within the jurisdiction of the appropriate State Supreme Court" (*see Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 627 (1986)), has this Court's unquestioned support. *See Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *id.* at 438 (Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ.).

This Court's rulings make clear that *Younger* concerns are at their zenith when state courts have not been given the chance to pass on federal claims. Thus, "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate

remedy, in the absence of unambiguous authority to the contrary." *Pennzoil*, 481 U.S. at 15. Indeed, the requirement that a federal plaintiff show "state procedural law bar[s] presentation of [its] claims," *Moore v. Sims*, 442 U.S. 415, 432 (1979), is an established one, which traces its origins to principles dating back over 185 years, and which have "for so long been applied by this Court that [they are] beyond debate." *Debartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (citing *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, C.J.)). In this case, the district court, backed by findings that Petitioner's evidence "fail[ed] to create even an inference of prejudice" against him by the Supreme Court of Hawaii, *see* Pet. App. 88 (No. 89-1506), and the court of appeals, on review of the district court's dismissal, concluded that these principles prohibited Petitioner's attempt to restrain, as in *Middlesex*, ongoing state attorney discipline proceedings, particularly where, as in *Moore* and *Pennzoil*, appropriate and sufficiently protective avenues for litigating federal issues had not yet been exhausted in the state courts. Whether, having been dismissed by both courts below, Petitioner has raised any substantial basis for overturning these exercises of restraint is the main issue here.

A. Background of the Litigation; Supreme Court of Hawaii Rule 13 and the Protections Available to Respondent Counsel.

This case arises from the paradox created by the Sixth Amendment mandate that an indigent "accused shall enjoy [not only] the right . . . to have the Assistance of Counsel for his defense," but " 'the right to the *effective*

assistance of counsel.' " *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also* Haw. Const. art. I, § 14; *State v. Antone*, 62 Haw. 346, 615 P.2d 101 (1980). Because of the vexing reality that a defendant may "win by losing," and Hawaii's "legitimate wish" "that [its] judgments remain intact on appeal," *Wheat v. United States*, 486 U.S. 153, 161 (1988), the Hawaii Supreme Court in 1984 promulgated a rule intended properly to deter and remedy the unnecessary generation of "ineffective assistance" errors.

Rule 13 provides for the commencement of a Special Master's inquiry and recommendation "[w]here the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final[.]" Haw. S. Ct. R. 13 (Pet. App. 88 (No. 89-1531)). The Rule requires appointment of a master "to determine whether action against the counsel alleged to have been incompetent is warranted" (*id.* ¶2), and authorizes avenues for raising of defenses by the respondent "why corrective action . . . should not be taken," appointment of a Rule 13 prosecutor, discovery, evidentiary hearing, recommended decision, and review in the Supreme Court of Hawaii (*id.* ¶¶2-9). Review is also available under the all-writs power, Haw. Rev. Stat. §§ 602-5(6) & (7).

For several reasons, both evident on the face of the rule, and from other provisions of Hawaii law, the decision of all issues by the Special Master, including the underlying issue of ineffective assistance, is *de novo*. The Rule expressly treats a respondent attorney as having been only "alleged to have been incompetent," and grants the Special Master (and the Supreme Court) the express

authority to dismiss the proceedings for any reason "why corrective action . . . should not be taken" (Rule 13 ¶¶4, 7 (Pet. App. 88-89 (No. 89-1531)). These include the claim that ineffectiveness did not occur (or, relatedly, was in fact "caused" by a judge or prosecutor). Under settled Hawaii preclusion principles, the triggering finding of ineffectiveness has no bar, merger, issue preclusive, or law of the case effect, particularly when reversal occurs on a direct appeal. This is true as a respondent attorney could not possibly be in privity with his former client on the ineffectiveness issue. *See Santos v. State*, 64 Haw. 648, 652, 646 P.2d 962, 965 (1982) (per curiam); *cf. Martin v. Wilks*, 109 S. Ct. 2180, 2185 (1989) ("party seeking a judgment binding upon another cannot obligate that person to intervene"). A fortiori, any federal reason why sanctions may not issue may be advanced to the Master. *See id.*

Hawaii law also makes clear that the respondent attorney is not required to respect the confidences of his former client. Under DR 4-101(c), *codified at* Haw. S. Ct. R. 2.2(a) (1984), the respondent lawyer "may reveal . . . confidences or secrets necessary . . . to defend himself against an accusation of wrongful conduct." No Hawaii case, moreover, limits this "self-defense" exception to the attorney client privilege to instances where the client charges that the lawyer's conduct is wrongful.

The Rule permits full review of the master's report in the Supreme Court of Hawaii. *See* Rule 13, ¶10 (Pet. App. 90 (No. 89-1531)). The state court retains full discretion to order "dismissal of the proceedings" (*id.*), and, under Hawaii law, it is clear that the Supreme Court may consider any federal claim why remedial measures ought be

denied, even if the Master may not. *HOH Corp. v. Licensing Board*, 736 P.2d 1271 (Haw. 1987).

So understood, Rule 13 closely and compellingly serves interests at the heart of Hawaii's criminal justice system. The Rule's overriding purpose is to protect criminal defendants who are in fact innocent, but whose defenses are not believed (or not advanced at all) on account of their counsel's ineffectiveness. In this critical way, the Rule reflects the state court's commitment "to enforce the Supreme law of the land." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.2 (1985). The Rule "stands as a disincentive for competent attorneys" to turn criminal trials " 'into reversible trials,' " *State v. Smith*, 68 Haw. 304, 313-14, 712 P.2d 496, 502 (1986), and, by recognizing that "the law" includes a defendant's own rights, confirms that "counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

B. The Rule 13 Proceedings Here and Proceedings in the United States District Court.

Late in 1985, the Hawaii Supreme Court triggered the filing of a Rule 13 case against Petitioner Earle A. Partington, a Honolulu lawyer, by finding on direct appeal that Clifford Clarke was denied effective assistance of counsel by Partington's representation at Clarke's murder trial in 1984. *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985) (Pet. App. 86 (No. 89-1531)).

Though Partington, as appellate counsel, had not included trial ineffectiveness in the Opening Brief in

Clarke, he did inform the appellate court prior to argument that the state trial judge had complained to the Office of Disciplinary Counsel about his failure to make a closing argument, and moved, on Clarke's behalf, for a remand to the trial court "for the limited purpose of holding a hearing on the competence of [Clarke's] present attorney at the trial." Motion to Remand, No. 10041 (Haw. Nov. 9, 1984), Resp. App. 6 (No. 89-1531).

The trial judge's complaint, brought to the attention of the Hawaii Supreme Court by Clarke's motion, stated that "by failing to give a final argument to the jury on behalf of his client and by stating in the presence of the jury that it would be a 'waste of time', Mr. Partington intentionally attempted to make reversible error, i.e., to prejudice his own client's case for the purpose of forcing an appellate court to reverse what Mr. Partington anticipated would be a conviction." Letter from Leland Spencer to Office of Disciplinary Counsel (Aug. 1, 1984), at 3, Exh. "B" to Complaint, No. 87-0172 (D. Haw. filed Mar. 9, 1987), Clerk's Record 1, Resp. App. 16 (No. 89-1531), *infra*. According to the partial transcript attached to the court's letter, also presented to the Supreme Court of Hawaii, at the time closing was to be given, and with the record reflecting the presence of the jury, Partington had stated that "in view of there being no cross-examination of Debra Lin Arcala, my client and I feel closing argument would be a waste of time." Tr. at 2, Cr. No. 59285 (Haw. Cir. May 24, 1984), Resp. App. 19 (No. 89-1531). The Supreme Court of Hawaii was also informed of a letter Clarke wrote to the Hon. Robert Won Bae Chang, a judge of the Hawaii Circuit Court for the First Circuit

(Hawaii's trial court of general jurisdiction), after Partington provided Clarke with the trial judge's disciplinary complaint. While accusing the trial judge of bias, Clarke in that letter, noted that the trial judge had "also charged my Attorney for not making a closing argument at the end of my trial" Resp. App. 21 (No. 89-1531). Clarke then stated:

> At that time my Attorney Earl[e] Partington suggested to me for not making a closing argument as a tactic to find pitty from the Jury at that time. I agreed because I didn't fully understanding [sic] court procedure and tactic.
>
> Now I feel that I made the wrong decision in agreeing with my lawyer.
>
> Because I did want a closing argument, but took my lawyer's advice.

Letter from Clifford Clarke, Sr., to the Hon. Robert Won Bae Chang, dated Oct. 30, 1984, attached to Letter from Petitioner to Clerk, Circuit Court of the First Circuit, C.R. No. 59285 (Haw. Cir. Nov. 2, 1984), Exh. "B" to Motion to Remand, No. 10041 (Haw. Nov. 9, 1984), Resp. App. 21 (No. 89-1531).

Acting on the motion for remand, the Supreme Court of Hawaii on December 6, 1984, denied remand "without expressing an opinion on the issue of effective assistance of counsel." Order, No. 10041 (Haw. Dec. 6, 1984), Resp. App. C (No. 89-1531). On December 27, 1984, after hearing argument, the Court, exercising its right to "apply [its] plain-error rules," *Engle v. Isaac*, 456 U.S. 107, 135 n.44 (1982), acted on the reserved issue of trial counsel's effectiveness, and vacated the conviction. Pet. App. C (No. 89-1531). The court thus found Partington ineffective

because he (1) did not make an opening statement; (2) did not cross-examine the victim's mother ostensibly because the State did not make available records concerning her; (3) did not call the mother after receiving the records; (4) elicited testimony from two State witnesses that they thought Clarke was guilty; and (5) did not make closing argument. *See id.*; 880 F.2d at 118, Pet. App. at 3 (No. 89-1531). Following the judgment of vacatur, Rule 13 proceedings were commenced in February 1986 with the appointment of Joseph M. Gedan as Special Master. *See* 880 F.2d at 119, *id.* at 8. Partington filed an answer asserting that his decisions in *Clarke* were based on legitimate trial tactics, but that the attorney-client privilege barred him from revealing the basis therefore. *Id.* Howard T. Chang was appointed Rule 13 Prosecutor in August, 1986. *Id.* Clarke, having never sought in his appeal outright reversal of his conviction, but at most only a new trial (Resp. App. 4 (No. 89-1531)), did not seek this Court's review, nor did Partington seek leave to intervene for appeal purposes.

On March 9, 1987, while the Rule 13 proceedings were fully pending (albeit behind the schedule identified in Rule 13), Respondent Partington filed the action below in the United States District Court for the District of Hawaii, seeking an injunction prohibiting the State officials from proceeding against him under Rule 13 and a declaratory judgment that Rule 13 is unconstitutional. 880 F.2d at 119-20, Pet. App. 8-9 (No. 89-1531).

In his suit, Partington asserted that the pendency of the Rule 13 case violated his rights under the First, Fifth, and Sixth Amendments, as incorporated by the Fourteenth Amendment, and the Equal Protection Clause. *Id.*

at 119. On July 1, 1987, the District Court, Kay J., granted Petitioners' motion to dismiss, or for summary judgment, under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny (Pet. App. 86-87 (No. 89-1506)).

Citing *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), the court rejected Partington's suggestion "that the Hawaii Supreme Court has prejudged this case," and found the absence of "even an inference of prejudice" (Pet. App. 88 (No. 89-1506)). The court rejected the claim that *Withrow v. Larkin*, 421 U.S. 43 (1976), forbade dismissal (Pet. App. at 88-89 (No. 89-1506)), and noted Partington did not argue that Rule 13 "is 'flagrantly and patently' unconstitutional" so as to counsel against dismissal (*id.* at 90). Having so found, the court rejected Partington's summary judgment motion (*id.*).

C. Proceedings in the United States Court of Appeals.

On appeal,[2] a divided Ninth Circuit panel (Wallace, and Noonan, JJ.), affirmed, reasoning that Partington's challenge was "strikingly similar" to that in *Middlesex*. In response to Petitioner's two main arguments why *Younger*'s familiar three-part test was not met, namely, that "the attorney-client privilege procedurally bars him from disputing the Hawaii Supreme Court's finding of ineffectiveness of counsel" and that "both the special master and the Hawaii Supreme Court are biased against him," 880

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[2] A more complete recitation of the arguments on appeal is presented at pp. 11-14 of the Petition in No. 89-1506. Because of the limited grounds on which Partington seeks review, a shorter summary of the argument below is provided here.

F.2d at 123, 124, Pet. App. 17, 20 (No. 89-1531), the court of appeals reasoned that, under *Pennzoil* and other authority, Partington's challenge to the adequacy of the State proceedings for *Younger* purposes failed on its face. 880 F.2d at 122, 123-28, Pet. App. 15, 16-30 (No. 89-1531). The majority rejected any claim that the state proceedings were animated by "bad faith" and dismissed claims that Rule 13 was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph," *id.* 128-29, Pet. App. 30-32, and denied as not properly raised the claim that the *Clarke* reversal's asserted immediate defamatory impact made abstention inapt. *id.* 129-30, Pet. App. 32-33.[3]

Judge Noonan concurred and filed a separate opinion comparing the law of statutory recusal that controls the proceedings in the federal courts. 880 F.2d at 131-38. Judge Reinhardt dissented on the ground that because "the Hawaii Supreme Court, *sua sponte*, raised *and decided*, on the merits, the issue of ineffective assistance of counsel in a manner adverse to [Partington,]" the state court, in any subsequent review of a recommendation from the Special Master, would not be, "as a practical matter, an unbiased adjudicator." 880 F.2d at 140, Pet. App. 61 (No. 89-1531). Although the record in the Rule 13 action might be substantially different than in the *Clarke* appeal, and

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[3] Having affirmed the dismissal below, the two-judge majority nonetheless imposed "Rule 11" sanctions against the State officials for seeking their appellate damages under Fed. R. App. P. 38. *See* Pet. for Cert. at 14-16 (No. 89-1506). Judge Reinhardt concurred in the sanctions, but on other grounds. *See* Pet. App. 82-83 (No. 89-1531).

indeed might never reach the Supreme Court if the Special Master found, for example, that Partington's actions were legitimate responses to the trial judge's rulings in *Clarke*, Judge Reinhardt reasoned that, since it would be "logically inconsistent" for the state court to find that Partington was not "ineffective" in light of *Clarke*, the proceedings could not be cured by a timely motion for recusal, as a panel recusal "would be directly contrary to the disciplinary system the Hawaii Supreme Court actually intended." Pet. App. 68, 77 (No. 89-1531).

After petitions for rehearing were filed, the Supreme Court of Hawaii decided *Matsuo v. State*, 70 Haw. 573, 778 P.2d 332 (1989), a post-judgment proceeding under Rule 40, Hawaii R. Penal P., which in the circumstances of that case, involving a criminal conviction that had survived direct review, held that it would be "unfair" to initiate a Rule 13 proceeding without allowing the attorney accused of ineffectiveness to be heard first. This decision was called to the court's attention by Partington under Fed. R. App. P. 28(j). In November, 1989, the Hawaii Supreme Court also amended Rule 40 to provide that in postconviction proceedings where ineffectiveness of counsel is raised, the attorney accused of ineffectiveness shall be given notice and an opportunity to be heard. This matter, however, was not raised below by any party. On December 22, 1990, the court denied all rehearing petitions and rejected Petitioner's request for en banc review. Pet. App. "B," No. 89-1531.

D. Further Proceedings in the State Courts.

Following the denial of rehearing in the court of appeals, the Special Master issued an Order to Show Cause why the Rule 13 case should not proceed to a

hearing. *See* Resp. App. "F" (No. 89-1531). Partington did not respond formally to this Order, and, instead, filed a motion, in the Supreme Court of Hawaii, in the nature of mandamus, seeking dismissal of the Rule 13 proceedings with prejudice and recusal of the justices on the basis of the state court's asserted "institutional bias" and the "utter futility" of the Rule 13 proceeding in light of Clarke's purported assertion of the attorney/client privilege. *See* Resp. App. "D" (No. 89-1531). On January 26, 1990, the Supreme Court of Hawaii, per its acting Chief Justice, denied the motion "without prejudice to any timely exceptions that may be filed, or other timely relief that may be sought, after the submission of the master's decision and proposed order[.]" Resp. App. "E". The Master entered further procedural orders and denied Partington's informal request for recusal. Resp. App. "F". On February 12, 1990, the Supreme Court of Hawaii denied, also as premature, a second motion to the Court in the nature of mandamus, seeking immediate disqualification of the Master and Rule 13 prosecutor, as well as further rulings as to the course of proceedings below, (Resp. App. "G" and "H"). The Special Master, despite this disposition, took notice of several of Partington's claims, and issued further rulings, for example, that the Rule 13 proceedings would be *de novo* as to all issues, and that the Rule 13 prosecutor shall have the initial burden of proof. Resp. App. "I" (No. 89-1531). On February 23, 1990, a new Rule 13 prosecutor was appointed, who has, since the petition was filed in No. 89-1531, obtained Clarke's express written waiver of the attorney client privilege for "all confidential communications" "concerning Mr. Partington's decision: 1) whether or not to make an opening statement, 2) whether or not to cross-examine or recall Debralin Arcala, and 3) whether or not to make a closing argument." Resp. App. "J" (No. 89-1531).

REASONS FOR DENYING THE WRIT

The petition in No. 89-1531 presents no issue meriting this Court's review, and should be denied. As shown already in the State officials' petition in No. 89-1506, taken seriously, the premises of Partington's federal attack on the ongoing Rule 13 proceedings at issue here require repudiation of not only settled abstention precepts but principles of restraint that are "beyond debate." *Debartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

Although the asserted "Sixth Amendment" bar to Partington's "fair opportunity to litigate" has been marred by a waiver and standing defect from the beginning of this lawsuit, was not firmly pressed in the courts below, and in any case depends on reading the Sixth Amendment in ways the Court has rejected, *see Weatherford v. Bursey*, 429 U.S. 545 (1977), Clarke's recent waiver of the attorney client privilege eliminates any argument at the start, let alone any that could overcome *Younger*.

Likewise, Petitioner's "institutional bias" arguments, taken seriously, would wrongly weaken the rigorous standards that must be met to effect judicial recusal as a matter of federal constitutional law, *see Aetna Life & Casualty, Inc. v. Lavoie*, 475 U.S. 813 (1986), and, as the court below held, do not deal with *Younger*'s requirement that Petitioner "assert its state remedies [to eliminate bias] in a timely manner." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 17 n.16 (1987). The Petition never addresses this, and, in the end Petitioner's bias argument is simply the improper

suggestion that state judges "will not enforce the supreme law of the land," *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.1 (1985).

Finally, while it is debatable whether Petitioner preserved his claim that the asserted immediate impact of *State v. Clarke* exempts this case from *Younger* dismissal, that claim plainly presents no basis for review as Petitioner faces no more than "the cost, anxiety and inconvenience of having to defend against a single criminal [or important civil] prosecution[.]" 401 U.S. at 46; *See also Paul v. Davis*, 424 U.S. 693 (1976).

In sum, while the Petition may "involve significant policy issues," they are not issues presenting any true conflict with this Court's precedents or with those of other federal courts, or which otherwise merit this Court's review. The court below, as to its judgment of affirmance, did not depart from accepted practice so as to justify exercise of this Court's supervisory power.

In fact, from abstention to *re judicata*, Petitioner's arguments, if granted, would rewrite long-settled law governing established relationships among the state and federal courts.

A. The Dismissal of Petitioner's Claims Under the Younger Doctrine Was and Remains Consistent with the Sixth Amendment.

Running throughout each of Petitioner's arguments why review should be granted is the novel argument that the mandatory dismissal required by straightforward application of the *Younger* doctrine is somehow overcome in Rule 13 cases, which are intended to *effect* the Sixth Amendment, on the basis that those proceedings *offend*

the Sixth Amendment. *See* Pet. for Cert. at 11, 12, 13, 14-16, 20-21. Perhaps none of the arguments in the Petition have less merit than this set of novel contentions, and, indeed, none of the judges below remotely suggested the Sixth Amendment issues Partington raises were, *Younger* aside, even "colorable" or "important." Pet. App. 32, 37-38 (No. 89-1531).

Partington's arguments, fairly stated, purport to raise two sorts of Sixth Amendment interests: (1) a purported "right of independence" of counsel (Pet. App. at 21); and (2) the asserted Sixth Amendment interest in client confidences (Pet. App. 14). For at least the following reasons, neither of these asserted interests in the slightest merits this Court's scarce resources.

As to the first asserted interest, it is dubious whether Partington has Article III or prudential standing. As to the former, the ineffective assistance issue in *Clarke* was at least arguably decided as a matter of *state* constitutional law as to which the federal standard enunciated in *Strickland v. Washington*, 466 U.S. 466 (1984), is not coterminous. Thus, even if, for "injury-in-fact" purposes, Partington now stands in the shoes the State would have worn had it sought review in *Clarke*, it is dubious whether any federal court had authority over the State's interest in the so-called "presumption of effectiveness." *See Michigan v. Long*, 463 U.S. 1032 (1982). As to the latter, while on occasion, this Court has recognized that counsel may assert their clients' rights, *see Department of Labor v. Triplett*, 58 U.S.L.W. 4388, 4390 (U.S. Mar. 27, 1990), here Clarke, as an indigent defendant provided appointed counsel, had no "due process right" to Partington's style of representation. *Id.* "Petitioner does not, nor could [he]

defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel." *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2652 (1989). Indeed, as Clarke raised no claim in his appeal that, if granted, would have required outright acquittal, Clarke himself would have had no standing to appeal to this Court under 28 U.S.C. § 1257 on the Hawaii Supreme Court's remand in *Clarke* on a "presumption of effectiveness" issue. Partington thus lacks standing. Indeed, Partington virtually admits he lacked standing to seek review of the *Clarke* ruling. *See* Pet. for Cert. at 22 n.28. If he lacked standing then, he lacks it now. *Compare ASARCO v. Kadish*, 109 S. Ct. 2037, 2045 (1989). In addition, although this Court has derived from the Sixth Amendment a sphere of autonomy reserved to defendants themselves to conduct their own defense, *see Faretta v. California*, 422 U.S. 806 (1975); *McKaskle v. Wiggins*, 466 U.S. 168, 178 (1984), this sphere of autonomy has never been extended to appointed counsel, and, indeed, it is clear that the State's "legitimate wish" "that [its] judgments remain intact on appeal," *Wheat v. United States*, 486 U.S. 153, 161 (1988), may override even defense strategies to which the client expressly and knowingly consents, a point that applies a fortiori to Clarke's equivocal acquiescence in Partington's actions.

Indeed, Partington's full forfeiture of any opportunity to argue before the petit jury, even for a conviction of a lesser included offense, raises serious doubts of Partington's effectiveness under any standard, even with a "presumption of effectiveness." *See Evitts v. Lucey*, 469 U.S. 387, 395 (1984); *Anders v. California*, 386 U.S. 738 (1967); *Douglas v. California*, 372 U.S. 353 (1963).

The main point here is that, even if *everything* above on this score is wrong, Partington's argument that he was *not* ineffective is *no* basis for avoiding abstention. Counsel's effectiveness must simply be decided in state court.

Partington makes no argument that the existence of Rule 13 is, on these Sixth Amendment grounds, " 'patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be make to apply it,' " 401 U.S. at 53-54, *quoted*, Pet. App. 31 (No. 89-1531), and such an argument, if made, would plainly be frivolous. Likewise, it would border on the absurd to prohibit any inquiry into Partington's actions on the ground that there could be no "reasonable expectation" of determining that action under Rule 13's corrective standards was warranted. *See Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975).

Partington's contention relating to the Sixth Amendment's protections for attorney/client confidences likewise does not merit review. As an initial matter, this "Sixth Amendment" argument was not firmly pressed below, and, indeed, the Court of Appeals was generous to Partington in "interpret[ing]" Partington's privilege arguments as even addressing the "opportunity to litigate" prong of *Younger*'s familiar three-part test. *See* Pet. App. 18 (No. 89-1531). To the extent the Court of Appeals decided the "Sixth Amendment" issues below "without the benefit of briefing or argument" (Pet. for Cert. at 9), this defect can be laid squarely at Partington's door. The issue is not one provoking "plain error" review, *see Frisby v. Schultz*, 108 S. Ct. 2495, 2401 (1988), and certiorari is inappropriate.

Second, it is dubious whether Partington has any standing to assert Clarke's purported Sixth Amendment rights in his communications with Partington. Because Partington would be better off, *i.e.*, free of any "federal" limit on his right to dispute the charge of ineffectiveness if the Sixth Amendment were interpreted to permit disclosure of Clarke's confidences, Partington does not meet even the minimal "injury-in-fact" requirements of Article III. *See Caplin*, 109 S. Ct. at 2650. Partington is simply the wrong person to be asserting Clarke's Sixth Amendment interest in attorney/client confidentiality.

Third, contrary to Partington's arguments, the Sixth Amendment has never been interpreted to generate the *per se* bar on compelled disclosure of client confidences. So long as those confidences are not used against the accused, there is "no violation of the Sixth Amendment insofar as it is applicable to the States by virtue of the Fourteenth Amendment." *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977); *cf. Michigan v. Harvey*, 110 S. Ct. 1176 (1990); *Michigan v. Jackson*, 475 U.S. 625 (1986).

Although Partington suggests cases where Rule 13 could be abused to generate improper coerced disclosure of client confidences for use in subsequent criminal trials (*see* Pet. at 16), these facts are not before the Court. The issue here, at most, is whether Rule 13 offers Partington an opportunity to "raise his constitutional claims 'and have [those claims] timely decided by a competent state tribunal.' " Pet. App. 16.

This being so, the Ninth Circuit was on more than solid ground in asserting that, at best, the issue here was whether "Hawaii's interpretation of the attorney-client

privilege imposes a procedural bar that effectively prevents him from testifying on the issue of ineffectiveness because he cannot fully present his trial strategy defense." Pet. App. 18.

Although the Ninth Circuit suggested this as a procedural due process interest, it is doubtful whether the matter even rises to that level. As the Ninth Circuit observed in a related context, "[c]ourts have consistently rejected arguments that deprivation of evidence [due to a privilege] constitutes a denial of due process." *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1390 (9th Cir. 1986) (cases from three circuits).

As the Ninth Circuit held here however, what makes Partington's challenge to the Rule 13 proceedings against him plainly meritless is *Pennzoil*'s requirement that the attorney-client privilege must be shown by "unambiguous" authority to bar disclosure of the evidence Partington asserts he needs to defend himself. *See* 481 U.S. at 15. Partington does not even assert such authority, as a matter of state law, exists, and virtually concedes this issue. *See* Pet. for Cert. at 15.

If this were not enough, Partington's assertion that Clarke has "refus[ed] to waive the attorney client privilege" (*id.* at 14), has never been during this case's pendency, and, in any case, is not now, fully accurate. As noted, Clarke in 1984 revealed the tactical considerations leading to Partington's decisions, and, in any case, has now effected a broad waiver of the privilege. *See* Resp. App. 21, 54-59 (No. 89-1531). "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."

Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 70 (1984). This principle bars Partington's "Sixth Amendment" claim.[4]

B. Partington's Assertions of "Institutional Bias" are Wholly Insufficient to Overcome Dismissal.

Partington's claims of "institutional bias" (Pet. at 9-11) likewise do not merit review. Indeed, as noted in our petition in No. 89-1506, such unsupported challenges to the fairness of judges have often led to sanctions. *See McLaughlin v. Union Oil of California*, 869 F.2d 1039, 1047 (7th Cir. 1989); *Glass v. Pfeffer*, 849 F.2d 1261, 1268 (10th Cir. 1988); *INVST v. Chem-Nuclear Sys.*, 815 F.2d 391, 402-03 (6th Cir. 1987); *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985). In fact, taken to its conclusion, Petitioner's argument would render the Justices of this Court constitutionally disabled from hearing appeals challenging their past rulings. This could not be the law.

Petitioner's and Judge Reinhardt's heavy reliance on *Withrow v. Larkin*, 421 U.S. 35 (1975), is belied by this Court's remarks in *Aetna Life & Casualty Co. v. Lavoie*, 475 U.S. 813 (1986), in which the Court made clear that even a judge's "general frustration" with a class of litigants is "insufficient to establish any constitutional violation." *Id.* at 821. Indeed, as this Court observed in a related context,

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[4] Although this Court's procedure, in a case that has become moot pending appeal is to vacate the judgment and remand with instructions to dismiss the complaint, *see United States v. Munsingwear*, 340 U.S. 36 (1950), that disposition has already been effected under the *Younger* doctrine; thus, granting review even for the purpose of vacating and remanding is unnecessary.

depriving the state courts " 'of [the] opportunity' to reconsider previously rejected constitutional claims is fundamentally at odds with the principles of comity." *Smith v. Murray*, 477 U.S. 527, 535 (1986).

As recognized by the panel majority, Petitioner's argument that *Younger* could be overcome depends on two claims, both of which are incorrect, and neither of which is sufficient to overcome *Pennzoil*'s admonition that procedural inhospitality in the state courts must be demonstrated by "unambiguous authority." First is the contention that Rule 13 does not provide *de novo* review, a contention rejected not only by the Chief Justice of the Supreme Court of Hawaii's informal statements, *see* Pet. App. 26, but by the District Court, the Court of Appeals, *and* the Master. Insofar as these rulings, generous to Partington's claims, are reviewed "with great," *United States v. Hohri*, 482 U.S. 64, 74 n.6 (1987), if not "rigid deference," *Posadas v. Tourism Co.*, 478 U.S. 328, 339 & n.6 (1986), Partington's arguments of procedural inhospitality seek only to infect these proceedings with the very sort of "plain error" that prompts reversal in this Court. *See Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988).

Given these standards of deference and restraint, nothing in *Matsuo v. State*, 70 Haw. 573, 778 P.2d 332 (1989), or the recent amendments to Haw. R. Penal P. 40(f), which, at most, properly give more process to counsel whose trial strategies survive direct review, in the least alters the basis of dismissal. It is error to urge otherwise. *See Frisby, supra.* Likewise, Judge Reinhardt's assessment of the Justices of the Supreme Court of Hawaii simply ignores the findings by the District Judge, who by reason of his position has "special insights into local realities," *Withrow*, 421 U.S. at 58. Here, based on

Partington's own submission that the facts were not in dispute, Judge Kay found that "[t]he plaintiff's arguments fail to create even an inference of prejudice" (Pet. App. 88 (No. 89-T506)).

As to the second issue, as the panel properly found, what makes Partington's arguments of bias especially unmeritorious is Partington's failure properly to employ the state court recusal procedures that this Court held in *Kugler v. Helfant*, 421 U.S. 117 (1987), decided the same day as the reversal of preliminary relief in *Withrow*, provided the "procedural safeguards to guarantee that [state litigants] will not be denied due process of law." *Id.* at 128. Judge Reinhardt's suggestion that full-panel recusal is not contemplated under Rule 13 is simply wrong. By vesting authority to review Rule 13 recommendations in the Supreme Court of Hawaii, rather than in the three-member Intermediate Court of Appeals in Rule 13 cases referred pursuant to final order of the Supreme Court, Rule 13 simply assures that all Rule 13 cases in which review is needed are reviewed by a five member Court.

Particularly in light of *Pennzoil*'s requirement of "unambiguous" inhospitality in the state courts, the courts below were fully justified in finding that Partington enjoyed every necessary opportunity to litigate, and, if

Pennzoil remains the law, which it should, Partington has no basis for being in federal court.[5]

C. Partington's Challenges to the Asserted Immediate Impact of the Clarke Ruling Would Overrule Younger Itself and Do Not Merit Review.

Although Partington hints that the asserted immediate impact of the reversal in *Clarke* warrants exempting this case from *Younger*'s settled mandate, each of these arguments is predicated on the improperly imputed bias and procedural inhospitality that the Court of Appeals properly rejected, and which this Court, too, would be required to reject were review granted here.

Seen in this light, Partington's claim that review ought be granted to correct the Ninth Circuit's refusal to address his "immediate impact" argument is nothing less than a challenge to *Younger*'s main premise, namely, that "the cost, anxiety and inconvenience of having to defend against a single criminal [or important civil] prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term." 401 U.S. at 46. Although the Ninth Circuit did not reach this argument, the Court of Appeals, the State officials submit, acted well within

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[5] Thus, even if this case is not viewed as of the day it was filed, *see Pennzoil*, 481 U.S. at 17, Partington's recent, but premature invocations of the state court's mandamus authority to effect, under state law, the recusal he has been denied by federal law (*see* Resp. App. 36, 49 (No. 89-1531)), are insufficient to overcome *Younger* abstention, as Partington "cannot escape *Younger* abstention by failing to assert [his] state remedies in a timely fashion." *Pennzoil*, 481 U.S. at 17 n.16.

its discretion in concluding that the issue had not been properly preserved below, insofar as Appellant's Opening Brief, contrary to Fed. R. App. P. 28 and Ninth circuit procedure, did not inform the Court specifically where the "immediate impact" argument was raised in the trial court. Our main point here is that "this Court reviews judgments, not opinions," *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984), and the order in *Clarke*, as to Partington, was not reviewable in the inferior federal courts under the *Younger* doctrine. Indeed, insofar as Partington has not been deprived of anything to which due process precepts attach, *see Paul v. Davis*, 424 U.S. 693 (1976); *FDIC v. Mallen*, 486 U.S. 230 (1988), and the state court has not "arrived at a final, definitive position regarding how it will apply the [law] at issue to the particular [conduct] in question," *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985), review ought be denied because the dismissal below was required not just by the *Younger* doctrine, but by the more fundamental Article III requirement of a ripe controversy. *See Ariyoshi v. Robinson*, 477 U.S. 902 (1986), *on remand*, 887 F.2d 215 (9th Cir. 1989); *compare Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 535-38 (3d Cir. 1988); *see also Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 629 (1986) (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in the judgment). As the Ninth Circuit suggested, Partington's "immediate impact" argument, like his remaining arguments, will be subject to review here under 28 U.S.C. § 1257 upon any final judgment in the Supreme Court of Hawaii on review of the Rule 13 case.

Petitioner was properly remanded to seeking federal review here "in the customary course." *Pennzoil*, 481 U.S. at 18.[6]

CONCLUSION

For the foregoing reasons, the writ in No. 89-1531 should be denied.

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[6] Minimal respect for Congress's prescribed avenues for review ought to require Partington to seek review of any adverse orders in the state courts pursuant to 28 U.S.C. § 1257. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Indeed, to any extent the denials of mandamus in the Rule 13 proceeding constitute "law of the case" adverse to Partington, they are entitled to at least deference in these proceedings, although they are subject to review pursuant to 28 U.S.C. § 1257. *Compare* 28 U.S.C. § 1738 *with Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166 (1988).

APPENDIX "A"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1984

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285 APPEAL FROM THE JUDGMENT AND SENTENCE ENTERED ON JULY 2, 1984 FIRST CIRCUIT COURT HONORABLE LELAND H. SPENCER, JUDGE

FILED
1985 APR 29 PM 3:17
Sandra N. Yasui
CLERK SUPREME COURT

APPELLANT'S OPENING BRIEF*

[material deleted in printing]

I. THE TRIAL COURT ABANDONED ITS ROLE OF IMPARTIAL JUDGE AND ASSUMED THE ROLE OF PROSECUTOR IN THIS CASE AS WELL AS INTERFERED WITH THE APPELLANT'S ATTORNEY-CLIENT RELATIONSHIP.

On this issue Appellant relies on the cumulative effect of the trial court's conduct and rulings set out in A

*Addenda, tables and other material deleted in printing.

through F above combined with the following. At trial the State offered a photograph (State's Exhibit "5") and x-rays (State's Exhibit "13A-F", "14A-B", "15A-B") into evidence without having provided discovery. The trial court admitted the photograph and the x-rays ruling that failure to grant discovery is not a basis to exclude evidence (17 May 84 R.T. 42:17-44:25, 46:17-19; 21 May 84 R.T. 101:5-102:10). When the State offered two transcripts of the recorded interviews with Appellant's son, the trial court *sua sponte* and over Appellant's objection recessed into chambers where it edited the transcripts for the State determining what portions would be admissible (21 May 84 R.T. 87:10-22, 98:23-99:6).

A trial judge presiding over a trial has the obligation to maintain impartiality and fairness in the proceedings before him. *State v. Alfonso*, 65 Haw. 95, 98, 648 P.2d 696, 699 (1982). The trial judge must not violate the basic principle that the judicial and prosecutorial functions are separate and distinct and are not to be merged. *United States v. Jacquillon*, 469 F.2d 380, 387 (5th Cir.1972); *United States v. Marzano*, 149 F.2d 923, 926 (2nd Cir.1945). It is not the role of the trial judge who thinks the prosecutor inadequate to step in to the point where the jury will regard him as associated with the prosecution. *United States v. Cuevas*, 510 F.2d 848, 850 (2nd Cir.1975). Constantly restricting the defendant beyond any bounds of discretion while giving the prosecutor free rein is an example of a violation of the basic principle. *Killilea v. United States*, 287 F.2d 212, 217-218 (1st Cir.), cert. den. 366 U.S. 969, 81 S.Ct. 1933, 6 L.Ed.2d 1259, reh. den. 368 U.S. 872, 82 S.Ct. 64, 7 L.Ed.2d 73 (1961). And if a judge's conduct in a trial does not comport with the appearance

of justice, the conviction must be reversed. *United States v. Gigax*, 605 F.2d 507, 510 (10th Cir.1979).

The conduct of the trial judge throughout this case showed an extraordinary bias for the State. The prosecutor was given unbridled rein to offer evidence of dubious or no value and designed solely to show that the Appellant is truly a thoroughly rotten person. Non-compliance with the rules of discovery to the prejudice of the Appellant was repeatedly sanctioned by the trial court. Where the prosecutor did not know how to get in prior consistent statement evidence, the trial court *sua sponte* and over Appellant's objection took the transcripts which contained the statements and edited them for the State. Appellant's cross-examination of State's witnesses was repeatedly curtailed without cause and in the case of the alleged victim's mother it was blocked entirely unless Appellant's counsel wanted to cross-examine without the vital Family Court records relating to the mother's conduct with the alleged victim. And when Appellant's counsel sought to make an offer of proof in regard to these records, the trial court refused to accept the Family Court material in the record. This is but the tip of the iceberg in regard to the trial court's conduct. Only a full reading of the record can give a true flavor of the extraordinary bias of the trial court for the State.

Finally, notwithstanding the clear statement by Appellant's counsel that both he *and* Appellant felt that closing argument would be a waste of time and therefore would not be given (24 May 84 R.T. 40:5-41:22), the trial court said nothing at that time and then later complained against Appellant's counsel to the Disciplinary Counsel

for failing to make closing argument (R.242-244). Appellant's counsel was compelled by his ethical duty to advise Appellant of this complaint which obviously infringed on the attorney-client relationship as evidenced by Appellant's letter to the Circuit Court (R.241, 262-263). While Appellant recognizes that a judge has a duty to report attorney misconduct, here the trial court made no effort to inquire as to whether Appellant had knowingly and intelligently waived closing argument as a trial tactic. Instead, the trial court filed its complaint in ignorance of the facts and without regard to its consequences on the attorney-client relationship. Such conduct is evidence of the trial court's bias against the Appellant and in favor of the State. *Matter of Evans*, 411 A.2d 984, 996 (D.C.Ct.App.1980). In this case, the trial court had abandoned its judicial role and became a prosecutor. That rule of prosecutor continued even after trial in an effort to hinder Appellant's right to effective counsel on appeal.

VII. CONCLUSION

Appellant seeks the reversal of his conviction and a remand to the Circuit Court for a new trial.

DATED: Honolulu, Hawaii, April 29, 1985.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Attorney for Appellant

APPENDIX "B"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1984

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	) CR. NO. 59285)) APPEAL FROM) THE JUDGMENT) AND SENTENCE) ENTERED ON) JULY 2, 1984)) FIRST CIRCUIT) COURT)) HONORABLE) LELAND H.) SPENCER,) JUDGE

FILED*
1984 NOV 9 PM 3:37
Eugene L. Sabado
CLERK SUPREME COURT

MOTION TO REMAND CASE TO CIRCUIT COURT FOR LIMITED PURPOSE OF HEARING ON COMPETENCE OF PRESENT COUNSEL

MOTION TO APPOINT SEPARATE DEFENSE COUNSEL FOR PURPOSE OF SAID HEARING

COMES NOW Defendant-Appellant, Clifford M. M. Clarke, Sr., by and through his court appointed attorney, Earle A. Partington, and respectfully moves this Honorable Court for an order remanding this case to the Circuit

*Certificate of service and other material deleted in printing.

Court for the limited purpose of holding a hearing on the competence of Defendant-Appellant's present attorney at the trial of this case, and to further appoint separate counsel for Defendant-Appellant at said hearing.

These motions are made pursuant to Rule 6 of the Rules of the Supreme Court of the State of Hawaii and is based on Hawaii Revised Statutes Chapter 8, the attached Memorandum of Points and Authorities, the attached Exhibits "A" and "B", the Affidavit of Counsel attached hereto, and the record and file in this case.

DATED: Honolulu, Hawaii, November 9, 1984.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Attorney for Defendant-Appellant

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1984

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	) CR. NO. 59285)) APPEAL FROM) THE JUDGMENT) AND SENTENCE) ENTERED ON) JULY 2, 1984)) FIRST CIRCUIT) COURT)) HONORABLE) LELAND H.) SPENCER,) JUDGE

AFFIDAVIT OF EARLE A. PARTINGTON

STATE OF HAWAII CITY & COUNTY OF HONOLULU	)) SS:)	

Earle A. Partington, being first duly sworn on oath, deposes and says the following:

1. I am the court-appointed attorney for the Defendant-Appellant both on this appeal and in the trial court below because my client is indigent and cannot afford to pay for counsel.

2. Defendant-Appellant is presently incarcerated at Oahu Community Correctional Center and has been so

incarcerated since his arrest on the murder charge for which he was convicted.

3. Because of the nature of the charge against Defendant-Appellant (murder of a three year old child) and the personality of Defendant-Appellant, my relationship with him has not been easy. Defendant-Appellant believes he is wrongly incarcerated for a crime he did not commit, and has often expressed impatience and dissatisfaction at my inability to get him out of prison.

4. This impatience has been aggravated by the delay in prosecuting this appeal, a delay caused by a delay on the part of court reporters in preparing the transcripts of the trial.

5. On August 6, 1984, I received from the Office of the Disciplinary Counsel a complaint made by the trial judge in this case, the Honorable Leland H. Spencer, concerning my handling of the trial, a complaint which I had filed in the Circuit Court (Exhibit "A").

6. Because of the seriousness of Judge Spencer's complaint, I felt duty bound to provide a copy of it to Defendant-Appellant. I further asked attorney Ray A. Findlay to speak to Defendant-Appellant and advise him in this matter which Mr. Findlay did.

7. On November 1, 1984, I received a letter from Defendant-Appellant addressed to Circuit Judge Robert Won Bae Chang asking for a hearing in the matter of my competency at trial. After discussion with Judge Chang I filed this letter with the Circuit Court (Exhibit "B").

8. In the meetings I have had with Defendant-Appellant as well as in the telephone conversations I have

had with him since I sent him a copy of Judge Spencer's complaint, I have found Defendant-Appellant challenging my competence to represent him in this matter. Recently Defendant-Appellant has repeatedly questioned the advice I gave him at trial citing Judge Spencer's complaint as proof that I did something wrong at trial. He is now suspicious as to whether I am adequately representing him in this appeal.

9. Judge Spencer's complaint has had the effect of seriously impairing my relationship with Defendant-Appellant and unless this matter is resolved I am uncertain whether I can effectively represent him in this appeal.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Earle A. Partington
EARLE A. PARTINGTON

Subscribed and sworn to before me
this 9th day of November, 1984.

/s/ John F. Schweigert
NOTARY PUBLIC, State of Hawaii
My Commission Expires: 3/14/88

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1984

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285 APPEAL FROM THE JUDGMENT AND SENTENCE ENTERED ON JULY 2, 1984 FIRST CIRCUIT COURT HONORABLE LELAND H. SPENCER, JUDGE

MEMORANDUM OF POINTS AND AUTHORITIES

These Motions present a rather unusual situation. The trial judge below feels that Defendant-Appellant's present counsel did not adequately represent Defendant-Appellant at trial. The trial judge did not take any action at the trial nor did he wait until after the appeal was over and the attorney-client relationship terminated to take action. Rather he waited only until he was no longer involved in the case to complain to the Disciplinary Counsel thereby causing serious problems in the attorney-client relationship on appeal.

Either present counsel must be relieved (which presents serious due process problems) or a hearing must be held before further proceedings on appeal. Defendant-

Appellant seeks such a hearing and present counsel concurs in this in order to attempt to render harmless to the attorney-client relationship the damage this complaint has done. At such a hearing, Defendant-Appellant should have separate counsel from his present counsel, and it is requested that attorney Ray A. Findlay be so appointed.

DATED: Honolulu, Hawaii, November 9, 1984.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Attorney for Defendant-
Appellant

1ST CIRCUIT COURT
STATE OF HAWAII
FILED
1984 AUG 13 AM 11:38
H. SETO
CLERK

August 10, 1983

Clerk
Circuit Court of the First Circuit
Kaahumanu Hale
777 Punchbowl Street
Honolulu, Hawaii 96813

Re: *State v. Clarke*, CR. No. 59285

Dear Sir:

On August 6, 1984 I received from the Office of Disciplinary Counsel the enclosed copy of a letter of complaint by Judge Leland H. Spencer in the above-entitled case. Because this letter concerns the conduct of the above-entitled case, which is awaiting preparation of the Record on Appeal, I request that this letter of complaint with my cover letter be filed in the Circuit court records and included in the Record on Appeal for consideration by the Supreme Court in the appeal. This letter of complaint raises a serious issue, *inter alia*, as to whether the trial judge in this case is interfering in my professional relationship with my client as I am duty bound to disclose this complaint to my client.

Sincerely,

/s/ Earle A. Partington
Earle A. Partington
Attorney for Defendant-Appellant

Encl.

EAP:vs/ff87

cc: Defendant-Appellant
Prosecuting Attorney
Disciplinary Counsel

Circuit Court of the First Circuit
Judiciary Building
Honolulu, Hawaii
Chambers of the Third Division
August 1, 1984

DISCIPLINARY COUNCIL
1164 Bishop Street
Suite 600
Honolulu, Hawaii 96813

Gentlemen:

Re: *Earle A. Partington*

The case entitled, "State of Hawaii vs. Clifford M. M. Clarke, Sr.", Cr. No. 59285, was tried before me from May 7, 1984 to May 25, 1984. The defendant was charged with the murder of the child of his girlfriend.

The defense counsel, Earle A. Partington, chose not to cross-examine Debra Lynn Arcala, the child's mother and the State's key witness, because he lacked possession of Family Court records about the child and the mother which he felt he needed for purpose of cross-examination.

By way of background, the defense had shortly before trial filed a motion with the Family Court for production of the records and the motion was pending on May 18, 1984 when the defense had the opportunity to cross-examine the mother. The Court denied a defense request to continue the cross-examination until resolution of the motion in the Family Court. The Court reasoned that the defense had ample opportunity during the month preceding the trial to seek production of the Family Court records. The Court also reasoned that the defense would

have a later opportunity to call the mother as a hostile witness and to examine her with leading questions and to impeach her under Hawaii Rules of Evidence 607 and 611. In this regard, the Court ordered the mother to return for purpose of further testimony.

On May 23, 1984, the Family Court granted the defense motion and defense counsel was provided with Family Court records. Armed with the records, the defense again chose not to examine the mother even though the mother was present for purpose of further testimony.

At time for final argument, defense counsel made the following statement in open court in the presence of the jury:

> "Your Honor, in view of there being no cross-examination of Debra Lin Arcala, my client and I feel closing argument would be a waste of time." (A copy of the transcript is attached.)

In my capacity as presiding judge in the above case, I am reporting Mr. Partington's conduct to you for your evaluation. In my opinion, his failure to give final argument and his statement in the presence of the jury that it "would be a waste of time" constituted inexcusable violations of the Code of Professional Responsibility in at least two respects.

First, by choosing to not argue his client's case to the jury, Mr. Partington failed in an extremely important respect to perform his duty to zealously advocate his client's interest.

Mr. Partington states that it would be a "waste of time" to argue the case to the jury, However, it is for the jury, not the attorney, to determine whether the State had

proved the defendant's guilt beyond a reasonable doubt. Mr. Partington's failure to at least argue that the State had failed to prove its case constituted a clear failure to perform his duty to zealously advocate his client's interest. His conduct is a violation of DR7-101 of the Code of Professional Responsibility.

Secondly, by failing to give a final argument to the jury on behalf of his client and by stating in the presence of the jury that it would be a "waste of time", Mr. Partington intentionally attempted to make reversible error, i.e., to prejudice his own client's case for the purpose of forcing an appellate court to reverse what Mr. Partington anticipated would be a conviction. This conduct is a flagrant violation of DR7-101 of the Code of Professional Responsibility.

An attorney must obey the rules of law, evidence, practice and procedure. Such rules do not permit an attorney to deliberately prejudice his client's case in order to force an appellate court to reverse an anticipated conviction. This type of trial conduct must receive a very severe sanction in order to prevent a repetition from the same attorney and to set an example and prevent such conduct from other attorneys.

By hindsight, I was remiss in not ordering Mr. Partington to give final argument on behalf of the defendant with the sanction of contempt if he refused. My failure in this regard should not affect your evaluation of his conduct under the code of Professional Responsibility.

I did not report this matter to you promptly after the verdict in the case because I wanted to wait until sentencing was completed, post trial motion time limitations had

expired and there was no possibility of further proceedings before me as a presiding judge.

I fully realize that you may not agree with my evaluation of Mr. Partington's conduct. The purpose of this report to you is simply to give you the opportunity to evaluate his conduct and take whatever action you deem appropriate.

Very truly yours,

/s/ Leland H. Spencer
LELAND H. SPENCER
Third Judge

LHS:tm

Attach.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII	)	
	)	CR. NO.
vs.	)	59285
CLIFFORD M. M. CLARKE, SR.,	)	
	)	ORIGINAL
Defendant.	)	

PARTIAL TRANSCRIPT OF PROCEEDINGS

held before the HONORABLE LELAND H. SPENCER, Third Division Presiding, on Thursday, May 24, 1984. Jury Trial.

APPEARANCES:

JANICE FUTA — For the State
-and-
EMLIN HIGA,
Deputy Prosecuting Attorneys
City & County of Honolulu
1164 Bishop Street
Honolulu, Hawaii

EARLE A. PARTINGTON, ESQ., — For the Defendant
Schweigert & Associates
Suite 200, 250 S. Hotel St.,
Honolulu, Hawaii

REPORTER: SUSAN M. ECKEL, C.S.R. #120
Official Court Reporter
First Circuit Court

Thursday, May 24, 1984 — 2:20 p.m.

(The clerk called the case.)

THE COURT: All right. The record will reflect the presence of all counsel, the defendant and the ladies and gentlemen of the jury.

Mr. Partington, you may give your answering argument.

* * *

MR. PARTINGTON: Your Honor, in view of there being no cross-examination of Debra Lin Arcala, my client and I feel closing argument would be a waste of time.

No closing argument.

THE COURT: All right.

* * *

STATE OF HAWAII)
) ss
CITY AND COUNTY OF)
HONOLULU)

I, Susan M. Eckel, CSR #120, Official Court Reporter, do hereby certify that the foregoing pages complete a true and correct transcription of my stenographic notes in the above-entitled matter.

Dated this 23rd day of July, 1984.

/s/ Susan M. Eckel
OFFICIAL COURT REPORTER

FILED
1984 NOV -5 PM 2:11

B.CHO
CLERK

November 2, 1984

Clerk
Circuit Court of the First Circuit
Kaahumanu Hale
777 Punchbowl Street
Honolulu, Hawaii 96813

Re: *State v. Clarke*, Cr. No. 59285

Dear Sir:

I enclose a copy of a letter I have received from my client, the Defendant in the above entitled case. This was a letter sent by my client to me to forward to Judge Chang. After meeting with Judge Chang he concurred in my recommendation that this letter be filed as part of the record in the Clarke case. Therefore I request that Clarke's letter along with this cover letter be filed in *State v. Clarke*.

Sincerely,

/s/ Earle A. Partington
Earle A. Partington

EAP/jf/ff3
Encl.
cc: Prosecuting Attorney

EXHIBIT B

OCT. 30, 1984

Honorable Robert W.B. Chang.

I am writing this letter to you concerning my trial. I feel that I didn't get a fair trial because of Judge Leland Spencer being prejudice against me.

I have a copy of letter that was sent to my Attorney charging him in not representing me good during my trial.

Judge Spencer didn't give my lawyer ample time to cross examine Debralin Arcala, and making my lawyer use Ms. Arcala as a witness in my behalf.

Judge Spencer also charged my Attorney for not making a closing argument at the end of my trial.

At that time my Attorney Earl Partington suggested to me for not making a closing argument as a tactic to find pitty from the Jury at that time. I agreed because I didn't fully understanding court procedure and tactic.

Now I feel that I made the wrong decision in agreeing with my lawyer.

Because I did want a closing argument, but took my lawyers advice.

In the letter that I having in the matter of Judge Spencer I feel that Judge Spencer has been interfering with Client, Lawyer relation during the trial.

I would like to ask for a hearing in this matter.

I deeply appreciate a respond from you.

Thank You Very Much

Clifford M. M. Clarke Sr.

APPENDIX "C"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1984

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285

FILED

1984 DEC -6 PM 1:30
Eugene L. Sabade
CLERK SUPREME COURT

ORDER

Upon consideration of Appellant's Motion to Remand Case to Circuit Court for Limited Purpose of Hearing on Competence of Present Counsel and Motion to Appoint Separate Defense Counsel for Purpose of Said Hearing, and documents in support thereof, and it appearing that there is insufficient ground to grant leave to withdraw as counsel for Appellant Clarke under Hawaii Rules of Appellate Procedure 50,

IT IS HEREBY ORDERED that the motion to remand is denied, without expressing an opinion on the issue of effective assistance of counsel. It is unnecessary to rule on

the motion to appoint separate counsel, given the denial of the motion to remand.

DATED: Honolulu, Hawaii, December 6, 1984.

FOR THE COURT:

/s/ H. Lum
Chief Justice

[seal]

APPENDIX "D"

NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	)))))))	CR. NO. 59285

FILED*
1990 JAN 19 PM 3:53
Sandra H. Yasui
CLERK SUPREME COURT

MOTION TO DISMISS WITH PREJUDICE HSCR 13 PROCEEDINGS (IN NO. 10041), TO MODIFY MEMORANDUM OPINION OF DECEMBER 27, 1985 (IN NO. 10041), AND TO MODIFY MEMORANDUM OPINION OF OCTOBER 5, 1987 (IN NO. 11633) OR, IN THE ALTERNATIVE, FOR DISQUALIFICATION OR RECUSAL OF THE PRESENT JUSTICES AND RETIRED JUSTICE NAKAMURA AND FOR APPOINTMENT OF SUBSTITUTE JUSTICES TO CONSIDER WHETHER TO DISMISS WITH PREJUDICE HSCR 13 PROCEEDINGS (IN NO. 10041), TO MODIFY MEMORANDUM OPINION OF DECEMBER 27, 1985 (IN NO. 10041), AND TO MODIFY MEMORANDUM OPINION OF OCTOBER 5, 1987 (IN NO. 11633

*Certificate of service and other material deleted in printing.

COMES NOW Attorney Earle A. Partington *pro se* and respectfully moves this Honorable Court as follows:

1. to dismiss with prejudice the Hawaii Supreme Court Rule 13 proceedings initiated by the court against Attorney Partington (in No. 10041);

2. to modify the memorandum opinion of this court filed on December 27, 1985 (in No. 10041), by withdrawing all of the opinion after the first paragraph save and except the last sentence, with reads "Reversed and remanded."; and

3. to modify the memorandum opinion of the court filed on October 5, 1987 (in No. 11633), by the deletion of the words "because of the ineffective assistance of appellant's trial counsel" which appear in the second sentence of the first paragraph; or;

In the alternative for disqualification or recusal of the present justices of this court and retired Justice Nakamura and the appointment of substitute justices to consider whether;

1. to dismiss with prejudice the Hawaii Supreme Court Rule 13 proceedings initiated by the court against Attorney Partington (in No. 10041);

2. to modify the memorandum opinion of this court filed on December 27, 1985 (in No. 10041), by withdrawing all of the opinion after the first paragraph, save and except the last sentence, which reads "Reversed and remanded."; and

3. to modify the memorandum opinion of this court filed on October 5, 1987 (in No. 11633), by the deletion of

the words "because of the ineffective assistance of appellant's trial counsel" which appear in the second sentence of the first paragraph.

This Motion is made pursuant to Rule 27(a) of the Hawaii Rules of Appellate Procedure and Hawaii Revised Statutes § 601-7 and is based on the attached memorandum of points and authorities and the records and files in these cases.

DATED: Honolulu, Hawaii, January 19, 1990.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Pro Se

NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	)	CR. NO. 59285

AFFIDAVIT OF DISQUALIFICATION

STATE OF HAWAII CITY AND COUNTY OF HONOLULU	)	SS:

EARLE A. PARTINGTON, being first duly sworn on oath, deposes and says the following:

1. I am the former attorney for Clifford M. M. Clarke, Sr.; and I was wrongly adjudged to have rendered ineffective assistance of counsel by this court on December 27, 1985.

2. The present sitting justices of this court and retired Justice Nakamura have a personal bias or prejudice against me as demonstrated by the following facts:

> The present sitting justices and retired Justice Nakamura, by the decision of December 27, 1985, prejudged the ultimate issue of ineffective assistance of counsel without affording me prior notice or opportunity to be heard and after denying me a hearing on the issue of ineffectiveness when such a hearing was requested on this court by motion.

3. Joseph M. Gedan, the Rule 13 proceeding special master, has a personal bias or prejudice against me as demonstrated by the following facts:

> Gedan has a pecuniary interest, or at least the appearance of a pecuniary interest, in this matter by virtue of the monetary judgment I have obtained against him (and special prosecutor Howard T. Chang) in *Partington v. Gedan*, 880 F.2d 116, 131 (9th Cir. 1989).

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Earle A. Partington
EARLE A. PARTINGTON

Subscribed and sworn to before me
this 19th day of January, 1990.

/s/ Melanie Morris
NOTARY PUBLIC, State of Hawaii

My Commission Expires: 10/5/93

[seal]

NOS. 10041 AND 11633

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CR. NO. 59285
Plaintiff-Appellee,	)	
vs.	)	
CLIFFORD M. M. CLARKE, SR.,	)	
Defendant-Appellant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Attorney Partington *pro se*, former counsel for Defendant-Appellant Clifford M. M. Clarke, Sr., was adjudicated by this court to have rendered ineffective assistance of counsel to Defendant-Appellant during trial. The issue of ineffectiveness was raised *sua sponte* by this court during oral argument on appeal. On February 3, 1986, this court appointed Joseph M. Gedan as special master to conduct proceedings under Rule 13, Hawaii Supreme Court Rules. On August 13, 1986, Gedan appointed Howard T. Chang as special prosecutor for the Rule 13 proceedings.

On January 11, 1990, an Order to Show Cause was filed wherein Gedan ordered Partington and Chang "to show cause . . . within ten (10) days of the date of this Order, why the hearing in [No. 10041] should not be scheduled to be held [on February 12, 1990]."

Having received Gedan's Order to Show Cause, Partington now moves the court to dismiss the Rule 13 proceedings and to amend its memorandum opinions in the

matter specified by the motion herein or, in the alternative, for disqualification or recusal of the present justices of this court and retired Justice Nakamura and for the appointment of substitute justices to consider whether to dismiss the Rule 13 proceedings and amend the court's memorandum opinions in the manner specified by the motion herein.

ARGUMENT

1. Institutional Bias

In a recent opinion issued by this court, it was held that an attorney must have "an opportunity to explain his side of the story" before a Rule 13 proceeding can be initiated. *Matsuo v. State*, 70 Haw. ___, ___, 778 P.2d 332, 335 (1989). Rule 13 is entitled: "Proceedings Following Final Adjudication of Ineffective Assistance of Counsel in Criminal Cases." *Id.* n.7. An adjudication of ineffectiveness "is premature," the court said, "unless trial counsel is given the opportunity to explain his reasons for [the trial decisions in question]." *Id.* at 335.

From *Matsuo*, then, it is clear that if the issue of ineffectiveness is raised, then the proper sequence of events is as follows: (1) counsel is given an opportunity to explain the reasons for the tactical decisions in question; (2) where appropriate, a finding of ineffectiveness is entered; (3) with the entry of such a finding, the Rule 13 proceedings commence. *Id.*

In this case, however, Partington was afforded neither notice nor opportunity to explain the reasons for his tactical choices at trial. Indeed, when Partington requested such an opportunity following the trial judge's

complaint to the Office of Disciplinary Counsel immediately after the appeal was taken, this court denied his request. Nonetheless, the finding of ineffectiveness was made, and this court referred the matter to Rule 13 proceedings. As a result, Partington was denied due process and, contrary to the guarantees of equal protection of the law, as set out in the Fourteenth Amendment to the United States Constitution and Article I, § 5, of the Hawaii Constitution, he was singled out for treatment different from other counsel whose effectiveness is at issue. In other words, the court in *State v. Clarke* created a procedure unique to Partington in that he was denied an opportunity to be heard prior to being adjudicated ineffective, while under *Matsuo v. State*, every other attorney who may be adjudicated ineffective is afforded prior notice and an opportunity to be heard.

Partington's being adjudicated ineffective was a nullity, for, in the court's own words, such a "determination . . . is premature" if counsel has not been given the opportunity to explain his decision. The instant Rule 13 proceeding, which is premised on an invalid adjudication of ineffectiveness, should not be allowed to go forward. The special master cannot vacate the unconstitutional and wrongful adjudication of ineffectiveness rendered by this court, and therefore Partington cannot be required to go through this meaningless proceeding. The utter futility of the Rule 13 proceeding is even more apparent when it is realized that Defendant-Appellant has invoked the attorney-client privilege, thereby silencing Partington and preventing him from defending himself at any proceeding. The attorney-client privilege is part of the right to counsel clauses of the Sixth and Fourteenth Amendments to

the United States Constitution and Article I, § 14, of the Hawaii Constitution. *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964); *United States v. Melvin*, 650 F.2d 641, 645 (5th Cir. 1981); *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983). Further only the client can waive the attorney-client privilege. *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 459-60 (N.D. Cal. 1978); *see United States v. Esposito*, 436 F.2d 603, 606 (9th Cir. 1970). Defendant-Appellant flatly refuses to waive the attorney-client privilege.

The court's institutional bias in this case is clear because the court ordered the initiation of a Rule 13 proceeding upon a premature and unconstitutional determination of ineffectiveness.[1] A supreme court justice is disqualified from sitting in review of a case that would require the court to review the validity of an order previously made by him. *In re Estate of Beckley*, 31 Haw. 150 (1929). In the face of the clear institutional bias here, the

---

[1] Partington notes that Gedan has a financial interest in the case. *Partington v. Gedan*, 880 F.2d 116, 131 (9th Cir. 1989) (ordering Gedan and Chang to pay costs and attorneys' fees to Partington and amicus curiae). Consequently, Gedan is in a conflict of interest as the special master of the Rule 13 proceedings. *Thurston v. Allen*, 8 Haw. 391 (1892); Canon 3C(1), Code of Judicial Conduct; *see also* DR 5-101, Code of Professional Responsibility.

Partington also notes that, because of Chang's financial interest in the case, *Partington v. Gedan*, 880 F.2d at 131, Chang will be in a conflict of interest if he proceeds further as the special prosecutor in the Rule 13 proceedings. DR 5-101, Code of Professional Responsibility.

court must dismiss the Rule 13 proceedings and modify the memorandum opinions accordingly.

2. Personal Bias

In the alternative, Partington requests the disqualification or recusal of the present justices and retired Justice Nakamura, in accordance with the provisions of Hawaii Revised Statutes (HRS) § 601-7(b). Under *Beckley*, disqualification is mandated. The question of bias or other reason for disqualification must be settled before the Rule 13 proceedings actually commence. *In re Bouslog-Sawyer*, 41 Haw. 270, 274 (1956); *see* HRS § 601-7 (requiring the filing of affidavits "before the trial or hearing of the action or proceeding").

Following the disqualification or recusal of the justices, substitute justices should be appointed to consider the following: whether the adjudication of ineffectiveness was premature, and hence a nullity, for failure of the court to ascertain counsel's "side of the story" (*Matsuo v. State*, 778 P.2d at 335); whether the Rule 13 proceedings should therefore be dismissed; and whether the memorandum opinions should be modified as set out in this Motion.

CONCLUSION

For the reasons outlined above, the requested relief must be granted. Further, Partington respectfully requests prompt disposition of this Motion.

DATED: Honolulu, Hawaii, January 19, 1990.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Pro Se

APPENDIX "E"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CR. NO. 59285
Plaintiff-Appellee,	)	
vs.	)	
CLIFFORD M. M. CLARKE, SR.,	)	
Defendant-Appellant.	)	

FILED
1990 JAN 26
EUGENE L. SABADO
CLERK SUPREME COURT

ORDER

Upon consideration of the "Motion to Dismiss with Prejudice HSCR Rule 13 Proceedings . . . , to Modify Memorandum Opinion[s] . . . or, in the Alternative, for Disqualification or Recusal of the Present Justices and Retired Justice Nakamura and for Appointment of Substitute Justices to Consider Whether to Dismiss . . . HSCR 13 Proceedings . . . " filed by Earle A. Partington, it appearing that the motion is premature,

IT IS HEREBY ORDERED that the motion is denied, without prejudice to any timely exceptions that may be filed, or other timely relief that may be sought, after the submission of the master's decision and proposed order to this court in No. 10041. (*cf.* penultimate paragraph of Supreme Court Rule 13.)

DATED: Honolulu, Hawaii, January 26, 1990.

FOR THE COURT:

/s/ Frank Padgett
Acting Chief Justice

APPENDIX "F"

PROCEEDINGS BEFORE THE SPECIAL MASTER

STATE OF HAWAII

IN RE: EARLE A. PARTINGTON	)	No. 10041
	)	Supreme Court
	)	Cr. No. 59285
	)	First Circuit
	)	Court
	)	State of
	)	Hawaii
	)	

FILED
1990 FEB 1 AM 9:02
Sandra Yasui
CLERK SUPREME COURT

ORDER

On January 11, 1990, the Special Master issued and caused to be served an Order to Show Cause requiring the parties hereto, Howard T. Chang, Esq., as Rule 13 Prosecutor, and Respondent Earle A. Partington, Esq., to file memoranda and accompanying papers by January 22, 1990, showing cause why the hearing in this proceeding required by Rule 13 should not be held at 9:00 a.m. on the first business day thirty (30) days following the entry of mandate in the United States Court of Appeals in appeal No. 87-2375, as to which rehearing was denied by the Court of Appeals on December 22, 1989. The parties were also requested to address other matters, denoted as follows:

> (1) the need and basis for discovery, if any; (2) the procedures the parties desire or believe they are entitled to re: filing of briefs and proposed findings and conclusions of law, or any other

> papers the parties deem required or proper, as to all matters raised by the parties hereto, including claims and defenses under the Constitutions of the United States and Hawaii, and any and all grounds why the Rule 13 proceeding should be dismissed; and (3) other matters the parties deem necessary for immediate ruling, including, but not limited to, the desire, or right, of the parties for an earlier or later hearing date.

Order to Show Cause at 1-2. The parties were directed to file their written responses in the Supreme Court of Hawaii in appeal No. 10041 in accord with the terms of the Order to Show Cause.

On January 16, 1990, Respondent Partington, stating he was representing himself in this proceeding, wrote a letter to this Special Master, stating that without responses from the Special Master to the six questions proffered by a letter dated March 19, 1987, from Respondent's then-counsel, Boyce R. Brown, Respondent did "not know how I can respond to your order." Respondent also suggested that, for this Special Master to proceed in the case would breach Code of Judicial Conduct Canon 3C(1) and § 601-7 of the Hawaii Revised Statutes (1985), based upon the judgment awarding certain attorneys fees in *Partington v. Gedan*, 880 F.2d 116 (9th Cir.), *reh. denied* (9th Cir. Dec. 22, 1989).

On January 19, 1990, Rule 13 Prosecutor Chang wrote a letter to this Special Master, stating that he had received a copy of the Respondent's letter, which had suggested as well that the judgment in No. 87-2375 disqualified Prosecutor Chang from continuing as Rule 13 Prosecutor. Prosecutor Chang stated that he had tendered the matter

of his continued representation to the Office of Disciplinary Counsel, and accordingly, was unable "to comply with the Order to Show Cause within the time required."

On January 22, 1990, Respondent Partington also wrote a letter to this Special Master, referring to Rule 13 Prosecutor Chang's intention not to respond to the Order to Show Cause, stated that Partington did not intend to respond to the Order.

On January 22, 1990, no papers as required by this Master's order were filed in the Supreme Court of Hawaii, although, on January 19, 1990, Respondent Partington filed a Motion to Dismiss the Rule 13 Proceedings and for other relief, which motion has since been denied by the Supreme Court without prejudice.

So the record will be complete, Respondent's letter of January 16, 1990, together with the enclosed letter dated March 19, 1987, Rule 13 Prosecutor Chang's letter of January 19, 1990, and Respondent's letter of January 19, 1990, are attached to this Order as Exhibits "A" and "B," and "C," respectively.

As an initial matter, communications with the Special Master by letter are, as a general rule, to be discouraged. If the parties desire relief or wish to be excused from an order of the Special Master, they should file a proper motion in this proceeding with the Special Master, or, if appropriate, with the Supreme Court of Hawaii. For these and other reasons, the questions in Mr. Brown's letter of March 19, 1987, were not, and are not at this time, responded to. The Special Master will provide appropriate guidance to the parties after briefing of the issues contained in Mr. Brown's letter and other matters.

Indeed, it was the purpose of the Order to Show Cause to allow schedules to be set, and preliminary matters decided, in accord with the parties' desires, and the law, to facilitate informed adjudication. Neither party, however, responded properly to the Order to Show Cause. In order to give guidance to the parties, and to allow this matter to be decided fairly, and expeditiously, the Special Master hereby rules as follows:

First, although no formal motion to recuse the Special Master has been filed, the Special Master will, under the circumstances, construe Respondent's letter of January 16, 1990, as a motion to recuse, and will deny the motion. The motion proceeds from the premise that the judgment in *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989), awarding certain attorneys fees for a defense of a motion under Fed. R. App. P. 38 in that appeal renders the Special Master personally interested in this proceeding. As respondent notes, if the federal Court of Appeals judgment awarding fees is allowed to stand on such further review as may be sought, all that remains is for the District Court "to fix the amount." Nothing the Special Master can do in this proceeding can affect the collateral federal award, and thus the Special Master has no personal interest in this Rule 13 case that would prevent him from fairly and fully judging Mr. Partington's claims, or that would create an appearance of impropriety warranting recusal. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Sussel v. City and County Civil Service Comm'n*, Nos. 13430, 13484 (Haw. Dec. 19, 1989).

Moreover, the motion for recusal rests on the added premise that the Special Master is personally liable for the fee award. This premise is not correct. The appeal in

Partington v. Gedan, which sought prospective equitable relief, was against both the Special Master and Rule 13 Prosecutor in their official capacities. *See Papasan v. Allain*, 478 U.S. 265 (1986). Likewise, any award of attorneys fees against appellees in *Partington v. Gedan* would be against appellees in their official capacities. *See Kentucky v. Graham*, 473 U.S. 159 (1973). The real party in interest upon that part of the judgment in *Partington v. Gedan* adverse to Appellees is the State of Hawaii. *See Missouri v. Jenkins*, 109 S. Ct. 2463 (1989); *Library of Congress v. Shaw*, 478 U.S. 310 (1986); *Hutto v. Finney*, 437 U.S. 678, 693 (1978) (in official capacity action "it is obvious that the award will be paid with state funds").[1] For the reasons above, the motion for recusal is denied. As indicated by the Order to Show Cause, the Special Master will give the parties a full opportunity to present their claims.

Under the circumstances, to place the parties on notice of the course of proceedings, and absent a contrary order by the Supreme Court of Hawaii, it is hereby ordered that the hearing in the above-titled matter shall be held at 9:00 a.m. on the first business day thirty (30) days following the actual entry of mandate in the United States Court of Appeals for the Ninth Circuit in *Partington v. Gedan*, appeal No. 87-2375. The parties are well advised to monitor the progress of the Office of the Clerk of the United States Court of Appeals in issuing the mandate,

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[1] There is also a substantial claim that, given the structure of the Court of Appeals' ruling in *Partington v. Gedan*, the propriety of a facial recusal motion such as that brought here is procedurally precluded by the res judicata and collateral estoppel effects of the Court of Appeals' decision.

which has not yet issued. The parties will be notified, by an appropriate order, of the courtroom or other place where the hearing in this proceeding will take place.

Fifteen days before the hearing date, but not later than March 10, 1990, the parties shall submit the following papers to facilitate the Special Master's adjudication herein:

(1) Briefs addressing the first, third, fourth, fifth, and sixth questions in Mr. Brown's March 19, 1987, letter, stating definitively the party's position thereon;

(2) Proposed findings and conclusions of law, and a hearing memorandum containing a statement of the case, issues presented, standards of review, and legal arguments, together with legal citations and citations to proposed documentary or testimentary evidence proposed, as to all matters raised by the parties hereto, including claims and defenses under the Constitutions of the United States and the State of Hawaii, and all grounds why the Rule 13 proceeding should be dismissed, or why other action allowed by Rule should or should not be undertaken;

(3) Memoranda addressing any other matters the parties deem necessary for ruling, including, but not limited to, the desire, or right, of the parties for an earlier or later hearing, or postponement for purposes of discovery;

(4) A list of all witnesses expected to be called, documentary or other evidence to be proffered, and a brief summary of the substance of the evidence proposed;

(5) Any other documents, exhibits memoranda, motions, or papers the parties believe appropriate or necessary.

A prehearing conference will be held five days prior to the date of hearing, at 9:00 a.m. at a courtroom or other place to be announced. All parties shall file an original and five copies of papers required or allowed by this Order in the Supreme Court of Hawaii in appeal No. 10041, and under the caption as designated in the January 11, 1990, Order to Show Cause, and in this Order. Failure to file papers in accordance with the time limits of this Order will constitute a waiver of objection as to the matters not presented. Formal motions in advance of hearing will be entertained if filed up to and including the due date stated above for other filings. Any motion shall state with particularity the grounds upon which it is based, and the order or relief sought, and shall be accompanied by briefs, affidavits, or other papers as appropriate. Motions shall be served on the opposing party by hand delivery to the opposing party's place of business, and a response shall be filed within five days after service. All papers on motions shall be filed in the Hawaii Supreme Court in appeal No. 10041, and under the caption as designated in the January 11, 1990, Order to Show Cause, and in this Order. The Special Master, in light of the statements in Respondent's letter of January 16, 1990, considers Respondent to be now proceeding *pro se*. If any other persons are to appear for Respondent, a notice of appearance shall be filed in the Supreme Court of Hawaii in advance the appearance.

This order, or any part thereof, is subject to reconsideration if objection is filed within ten (10) days of its entry.

The Office of the Clerk of the Supreme Court of Hawaii is directed to serve this Order forthwith upon the

parties at their present addresses, as furnished to the Office of Disciplinary Counsel, State of Hawaii, by first class United States Mails.

Dated: Honolulu, Hawaii, February 1, 1990.

/s/ Joseph M. Gedan
JOSEPH M. GEDAN
Rule 13 Special Master

[Exhibits Deleted]

APPENDIX "G"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	)))))))	CR. NO. 59285

FILED*
1990 FEB 5 PM 3:05
Sandra H. Yasui
CLERK SUPREME COURT

MOTION FOR RECUSAL OF THE PRESENT JUSTICES AND RETIRED JUSTICE NAKAMURA, TO DISQUALIFY SPECIAL MASTER AND SPECIAL PROSECUTOR, FOR DECLARATION AS TO THE NATURE OF THE RULE 13 PROCEEDING HEREIN, FOR AN ORDER REQUIRING THE ISSUANCE OF AN ALLEGATION AND FOR DECLARATION AS TO THE PROCEDURE BY WHICH THE PROCEEDING IS TO BE CONDUCTED

Comes now Attorney Earle A. Partington *pro se* and respectfully requests this court for relief as follows:

1) For recusal of the present justices of the Supreme Court and Retired Justice Nakamura for the purpose of ruling on (a) the relief sought herein, and (b) any other matter before the court in this case, all based on the Certificate of Disqualification filed herein on January 19,

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*Certificate, Memorandum, and other material deleted in printing.

1990, and for the reasons set forth in the Motion filed herein on January 19, 1990;

2) For an order disqualifying the Special Master and Special Prosecutor in No. 10041 for bias as set forth in the Affidavit of Disqualification filed January 19, 1990, in light of the Order filed by the Special Master on February 1, 1990, and the opinion in *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989), that Partington has a Federal constitutional right not to be subjected to a hearing before a biased tribunal, 880 F.2d at 124;

3) For a declaration as to the nature of the Rule 13 proceeding herein in view of the confusion created as to whether that proceeding is *de novo* (as argued by the Special Master and Special Prosecutor in *Partington v. Gedan, supra*), or is a dispositional proceeding only as held by clear implication in *Matsuo v. State*, 70 Haw. 573, 778 P.2d 332 (1989);

4) In the event that the court declares in response to Partington's request in item (3) above that the Rule 13 proceeding against him is a *de novo* proceeding, it is requested that an allegation or complaint in the matter be served on Partington as required by Federal and state due process of law;

5) For a declaration of the procedure under which the hearing herein is to be conducted in view of the Special Master's refusal to provide Partington with notice of same, as set forth in the Order of February 1, 1990.

This motion is made pursuant to Rule 27 of the Hawaii Rules of Appellate Procedure, H.R.S. §601-7, and Article I, §5, of the Constitution of the State of Hawaii

and the Fourteenth Amendment to the Constitution of the United States; and is based on the attached Memorandum of Points and Authorities, and the records and files herein.

DATED: Honolulu, Hawaii, January 5, 1990.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Pro Se

APPENDIX "H"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CR. NO. 59285
Plaintiff-Appellee,	)	
vs.	)	
CLIFFORD M. M. CLARKE, SR.,	)	
Defendant-Appellant.	)	
	)	

FILED
1990 FEB 12
Eugene L. Sabado
CLERK SUPREME COURT

ORDER

Upon consideration of the "Motion for Recusal of the Present Justices and Retired Justice Nakamura, to Disqualify Special Master and Special Prosecutor, for Declaration as to the Nature of the Rule 13 Proceedings Herein, for an Order Requiring the Issuance of an Allegation and for Declaration as to the Procedure by Which the Proceeding is to be Conducted" filed by Earle A. Partington, it appearing inappropriate for this court to issue rulings or declarations at this stage of the proceedings,

IT IS HEREBY ORDERED that the motion is denied, without prejudice to any exceptions or other timely relief that may be sought after the submission of the master's decision and proposed order to this court.

DATED: Honolulu, Hawaii, February 12, 1990.

FOR THE COURT:

/s/ Frank Padgett
Acting Chief Justice

APPENDIX "I"

PROCEEDINGS BEFORE THE SPECIAL MASTER

STATE OF HAWAII

IN RE: EARL A. PARTINGTON	) No. 10041
	) Supreme Court
	) Cr. No. 59285
	) First Circuit
	) Court
	) State of
	) Hawaii
_____	)

FILED
1990 FEB 27 PM 2:58
Sandra H. Yasui
CLERK SUPREME COURT

AMENDMENT TO ORDER OF FEBRUARY 1, 1990

Based upon respondent's application, the applicable Rules and law and the record to date the Special Master makes the following determinations:

1. The findings in the Memorandum Opinion of the Supreme Court dated December 27, 1985 reversing and remanding the underlying case were necessary to adjudicate the rights of the Appellant Clifford M. Clarke and with respect to the conduct of the counsel were an expression as to the state of the record for the purpose of that adjudication only. Rule 13 was initiated for the purpose of having a special master make an independent judgement on that same record with an opportunity for the respondent to offer evidence and argue in his defence. The Special Master therefore orders that these proceeding are to be *de novo* without regard to any stated or implied judgement by the Court on the conduct of counsel.

2. The five items enumerated in the Court's Memorandum Decision is the conduct which is at issue. The respondent has taken the position (1) that his conduct was not occasioned by neglect and (2) has not taken issue with the Court's finding that, absent justification as trial tactics, conduct of counsel would not be within the range of competency demanded of attorneys in criminal cases. The respondent's Answer filed March 25, 1986 takes the position that respondent's actions were justifiable and appropriate as trial tactics. Unless the respondent amends his answer the Special Master shall consider items (1) and (2) of this paragraph as admitted and that justification as trial tactics as the initial determination to be made.

The prosecutor shall have the burden of proving by a preponderance of evidence that from the record there appears no justifiable trial tactic which would warrant the conduct of counsel. That record does not contain any explanation by respondent of the tactical considerations. The respondent shall have the burden of going forward with the evidence demonstrating the tactical considerations underlying his conduct.

The respondent in his answer claims that because of the attorney-client privilege he is precluded from discussing the reasons or the circumstances for his tactical decision. Upon application by respondent the Special Master will continue the these proceedings to allow respondent to ask for an opinion from the Disciplinary Counsel on that matter. Respondent shall by March 9, 1990 advise the Special Master (1) whether he has or will ask the Disciplinary Counsel for an opinion, (2) if a continuance is requested for that purpose, (3) of the extent to which he will go forward with the evidence, and (4) of any other relief sought.

3. The prosecutor shall respond by March 16, 1990 and a pretrial hearing will be held on March 19, 1990 at 9:00 at a site to be designated at which time the Special Master will hear argument on any motions and set a discovery and hearing schedule.

4. The respondent and the prosecutor, subject to the approval of the Special Master may agree to modify the terms of this order.

5. To the extent it is inconsistent with this Order, the Order of February 1, 1990 is amended and the provisions of the full paragraph on page 6 of that order is withdraw.

DATED: Honolulu, Hawaii, February 27, 1990.

/s/ Joseph M. Gedan
Joseph M. Gedan
Rule 13 Special Master